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FILED
JAN 9 1964
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SUPREME COURT OF THE UNITED STATES

No. 740

CHARLES THORNBERRY, - - - Petitioner,

versus

BUCHANAN COUNTY COAL CORPORATION, - - - - Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT.

DAN JACK COMBS,
Pikeville, Kentucky
Attorney for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

No. _____

CHARLES THORNBERRY, - - - - - *Petitioner,*

v.

BUCHANAN COUNTY COAL CORPORATION, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT.

The petitioner, Charles Thornberry, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW.

The opinion below has been reported in Charles Thornberry v. Buchanan County Coal Corporation, 323 F. 2d 517. A copy of the opinion is appended to this petition.

JURISDICTION.

The judgment of the court below was dated and entered October 11, 1963.

The jurisdiction of this court is invoked under United States Code, Title 28, Section 1254(1).

QUESTION PRESENTED.

Has the purchaser of all the coal in one, only, of several horizontal deposits the right to destroy other coal measures lying above a part of the purchase when the acquisition was subject to a provision that the mining rights granted were to be exercised so as not to interfere unnecessarily with the mining of other seams by the grantors, their heirs and assigns.

LAW INVOLVED.

The petitioner relied upon the rule of law that a deed should be construed so as to give effect to all its parts and provisions, Virginia Iron, Coal & Coke Co. v. Dye, 146 Ky. 521, 142 S. W. 1058, and upon a rule that interference with a right in real property is a taking of that right, Ferguson v. Covington, 108 Ky. 662, 57 S. W. 460.

Decisions of the forum sustain these rules.

STATEMENT.

Petitioner, Charles Thornberry, received from his father a deed conveying fifty acres of coal land in Pike County, Kentucky [Appendix, 12a-15a].

Some twenty-five years later he conveyed all the coal in the Clintwood Seam, upon this same tract, to the respondent. This deed [Appendix, 16a-19a] contained no specification of mining rights, but allowed respondent the same privileges petitioner had acquired when he received the coal from his father, subject,

however, to this limitation, "But the same are to be exercised so as not to interfere unnecessarily with the mining of other seams by first parties, their heirs and assigns" [Appendix, 17a].

Respondent entered upon its purchase and removed the coal so as to destroy three seams it had not purchased which lay above the Clintwood Seam and on 8.72 acres of the fifty acre tract.

Petitioner brought suit for his damages in the Pike Circuit Court, of Pike County, Kentucky, where the land lay.

Respondent removed to the United States District Court for the Eastern District of Kentucky on the ground of diversity of citizenship, because it is a Virginia corporation and petitioner a citizen of Kentucky.

Upon trial, which petitioner conducted without assistance of counsel, the court found against petitioner, hearing no evidence on behalf of respondent.

ARGUMENT.

The opinion of the Court of Appeals emphasizes the respondent's assertion that it did nothing negligent in the destruction of petitioner's property. The District Court, in its findings of fact and in its conclusions of law, had fallen into the same channel.

The petitioner did not seek damages for negligence. The respondent did not defend a charge of negligence. The petitioner sought damages because respondent had bought one seam of coal and taken four. Wrong is not excused because it is skillfully done.

During the evidence of the first witness for the petitioner the trial court limited his evidence to exclude the measure of damages saying, "And I think we might as well leave the question of measure of damages out of it until we determine whether or not under the law and facts this defendant has wrongfully mined coal there, which has caused you to lose other coal or other minerals" [Appendix, 40a].

Notwithstanding this, the trial court in deciding, said "Plaintiff's proof does not provide the court any basis on which his damages could be ascertained" and commented further, "On such proof it would be necessary for the court to indulge in speculation to place a monetary value on plaintiff's damages, which, of course, the court may not do" [Appendix, 106a].

The decision that the respondent could buy one seam of coal and take three others is in violent conflict with the applicable law of the Commonwealth of Kentucky. It is a precedent, already having its effect, for the waste of an irreplacable mineral resource by ruthless mining. This is aggravated further because the devastation occurs in a distressed region where spoliation for the same purpose is already a scandal of national proportions.

If further considerations were needed, the error of the trial court, in restraining the petitioner from producing evidence of the measure of damages and then deciding against him because he had not produced it, is such a departure from the usual course of judicial proceedings, sanctioned in the Sixth Circuit by affirmance, as to justify supervision.

Wherefore, it is respectfully submitted that this petition should be granted.

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Attorney for Petitioner.